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16 **UNITED STATES DISTRICT COURT**

17 **DISTRICT OF NEVADA**

18 U.S. BANK, NATIONAL ASSOCIATION AS
19 TRUSTEE FOR THE FIRST FRANKLIN
20 MORTGAGE LOAN TRUST, MORTGAGE
21 ASSET-BACKED CERTIFICATES, SERIES
22 2007-FF1,

23 Case No. 3:15-cv-00241-RCJ-WGC

24 **MOTION TO CERTIFY A QUESTION OF
25 LAW TO NEVADA'S SUPREME COURT**

26 Plaintiff,

27 vs.

28 SFR INVESTMENTS POOL 1, LLC, a
Nevada Limited Liability Company;
D'ANDREA COMMUNITY ASSOCIATION,
a Domestic Non-Profit Corporation; ALESSI
& KOENIG, LLC, a Domestic Limited
Liability Company; SIENA HOMEOWNERS
ASSOCIATION, a Domestic Non-Profit
Corporation; THE CLARKSON LAW
GROUP, P.C., a Nevada Professional
Corporation.

29 SFR INVESTMENTS POOL 1, LLC, a
30 Nevada limited liability company,

31 Counter-Claimant,

32 vs.

33 U.S. BANK, NATIONAL ASSOCIATION
34 AS TRUSTEE FOR THE FIRST FRANKLIN
35 MORTGAGE LOAN TRUST, MORTGAGE
36 ASSET-BACKED CERTIFICATES, SERIES
37 2007-FF1; TROY F. RHEAUME, an
38 individual; TROY T. OWEN, an individual,

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1 Counter-Defendant/Cross-Defendants.

2 Pursuant to NRAP 5, SFR Investments Pool 1, LLC (“SFR”) files this Motion to Certify a
 3 Question of Law to Nevada’s Supreme Court. It is based upon the attached memorandum of points
 4 and authorities and the filed pleadings and papers.

5 **MEMORANDUM OF POINTS & AUTHORITIES**

6 **I. INTRODUCTION**

7 On August 24, 2016, this Court entered an Order regarding one motion to dismiss and three
 8 motions for summary judgment. ECF No. 134. That Order noted that there is uncertainty about
 9 how Nevada’s Supreme Court interpreted NRS § 116.31168(1)’s incorporation of NRS § 107.090.
 10 *Id.* at 12:5-15. The instant Motion addresses this uncertainty by respectfully requesting this Court
 11 to certify a question of law to Nevada’s Supreme Court concerning 116.31168(1)’s incorporation
 12 of 107.090.

13 This Court should certify the following question to Nevada’s Supreme Court: **Whether**
 14 **NRS § 116.31168(1)’s incorporation of NRS § 107.090 requires homeowners’ associations to**
 15 **provide notices of default to banks even when a bank does not request notice?**

16 Certification is appropriate because: (i) the certified question’s answer “may ‘be
 17 determinative of’ part” of this case, (ii) *Bourne Valley*’s interpretation of 116.31168(1) acted as
 18 though “there is no controlling” Nevada precedent, and (iii) the answer “will help settle important
 19 questions of law.” *Volvo Cars of N. Am., Inc. v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006) (internal
 20 citation omitted).

21 **II. LEGAL ARGUMENT**

22 **A. Legal Standard**

23 Under NRAP 5(b), SFR can file a motion for an order that certifies a question to Nevada’s
 24 Supreme Court. If this Court issues such an order, then Nevada’s Supreme Court will have
 25 discretion over whether to answer the certified question. 5(a); *Fed. Ins. Co. v. Am. Hardware Mut.*
Ins., 184 P.3d 390, 392 (Nev. 2008). Nevada’s Supreme Court will answer a certified question
 27 when: (i) the question’s answer may be determinative of part of the federal suit, (ii) no controlling
 28

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1 Nevada precedent exists, and (iii) the question’s answer will help settle important questions of law.
 2 *Volvo*, 137 P.3d at 1164. As is explained below, these factors are satisfied, warranting certification.

3 **B. The Certified Question’s Answer will be Determinative of Part of this Case**

4 The first factor is whether SFR’s question is a “question[] of law of this state which may
 5 be determinative of” part of this case. 5(a); *Volvo*, 137 P.3d at 1164. Here, SFR’s question focuses
 6 on the interpretation of 116.31168(1), which is a “law of this state.” 5(a). As such, SFR’s question
 7 is a “question[] of law of this state” Additionally, the answer to SFR’s question “may be
 8 determinative of part of” this case because it will definitively resolve 116.31168(1)’s meaning.
 9 *Fed. Ins. Co.*, 184 P.3d at 392. On the one hand, *Bourne Valley* construed 116.31168(1)’s
 10 incorporation of 107.090 as not requiring associations “to provide notice of default to mortgage
 11 lenders even absent a request” *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832
 12 F.3d 1154, 1159 (9th Cir. 2016). On the other hand, *Bourne Valley*’s interpretation of 116.31168(1)
 13 is “only binding in the absence of any subsequent indication from the [Nevada] courts that our
 14 interpretation was incorrect.” *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983).

15 Importantly, Nevada’s Supreme Court has the final say over 116.31168(1)’s meaning. *Cal.*
 16 *Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001) (“It is solely within the
 17 province of the state courts to authoritatively construe state legislation.”). If Nevada’s Supreme
 18 Court rejects *Bourne Valley*’s construction of 116.31168(1), then the Ninth Circuit must follow
 19 Nevada’s highest court; *Bourne Valley* would not be binding. *United States v. Swisher*, 771 F.3d
 20 514, 524 (9th Cir. 2014); *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099,
 21 1106 n.6 (9th Cir. 2007); *Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n.3 (9th Cir.
 22 2003); *Pershing Park Villas Homeowners Ass’n v. United Pac. Ins. Co.*, 219 F.3d 895, 903 (9th
 23 Cir. 2000); *Owen*, 713 F.2d at 1464. To put it even more bluntly, “**a state supreme court can**
 24 **overrule us on a question of state law**,” *Henderson v. Pfizer, Inc.*, 285 F. App’x 370, 373 (9th Cir.
 25 2008) (emphasis added), and “we are required to follow intervening decisions of the [Nevada]
 26 Supreme Court that interpret state law in a way that contradicts our earlier interpretation of that
 27 law.” *Bonilla v. Adams*, 423 F. App’x 738, 740 (9th Cir. 2011). Essentially, 116.31168(1)’s
 28 meaning is an issue of state law that Nevada’s Supreme Court “can overrule” *Bourne Valley* on.

1 *Id.* As a result, this Court should certify SFR's question because it is a "question[] of law of this
 2 state which may be determinative of" part of this case. 5(a); *Volvo*, 137 P.3d at 1164.

3 **C. Bourne Valley Acted as Though there is No Controlling Nevada Precedent**

4 The second factor is whether "controlling Nevada precedent exists[.]" *Fed. Ins. Co.*, 184
 5 P.3d at 392. Certification is appropriate when there is no controlling Nevada precedent. *Volvo*, 137
 6 P.3d at 1164. Here, *Bourne Valley* acted as though "there is no controlling" Nevada precedent on
 7 116.31168(1)'s meaning.¹ Inexplicably, *Bourne Valley* ignored the Nevada Supreme Court's 2014
 8 *SFR* decision, which construed 116.31168(1). *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*,
 9 334 P.3d 408, 411, 417, 418, 422 (Nev. 2014). As Judge Dorsey noted, *Bourne Valley* "makes no
 10 mention of the Nevada Supreme Court's own interpretation of Chapter 116's notice provisions in
 11 the *SFR* opinion . . ." *U.S. Bank, N.A. v. Ascente Homeowners Ass'n*, No. 2:15-cv-00302-JAD–
 12 VCF, 2016 WL 4402807, at *1 (D. Nev. Aug. 17, 2016). Similarly, Judge Gordon observed that
 13 "the *Bourne Valley* majority opinion does not address the fact that the Supreme Court of Nevada
 14 has already construed this Nevada state statute to require notice to the mortgage lenders. Even the
 15 dissenting justices in *SFR* agreed this was the proper interpretation of Nevada's statutory scheme."
 16 *Deutsche Bank Nat'l Trust Co. v. SFR Investments Pool 1, LLC*, No. 2:14-cv-001131-APG-VCF,
 17 2016 WL 4419285, at *1 (D. Nev. Aug. 18, 2016) (internal citation omitted). Regardless, this
 18 Court should certify SFR's question because *Bourne Valley* acted as though there is no controlling
 19 Nevada precedent on 116.31168(1)'s meaning.

20 **D. The Certified Question's Answer will Settle Important Questions of Law**

21 The third factor is whether an answer to SFR's question "will help settle important
 22 questions of law." *Volvo*, 137 P.3d at 1164. Here, the meaning of 116.31168(1) is an important
 23 question of *Nevada* law, which "is solely within the province of [Nevada's Supreme Court] to
 24 authoritatively construe . . ." *Cal. Teachers Ass'n*, 271 F.3d at 1146.² Again, SFR's question is:

25 ¹ Compare *Bourne Valley*, 832 F.3d at 1159 (116.31168(1)'s incorporation of 107.090 did not
 26 require associations to provide banks with notice absent a request for notice), with *SFR Investments*
 27 *Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411, 417, 418, 422 (Nev. 2014) (116.31168(1)'s
 28 incorporation of 107.090 required associations to provide notice to banks that recorded their
 security interest).

² See also *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("It is not our function to construe a state

1 Whether NRS § 116.31168(1)'s incorporation of NRS § 107.090 requires homeowners'
 2 associations to provide notices of default to banks even when a bank does not request notice? If
 3 Nevada's Supreme Court answers this question with a "Yes,"—as it did in *SFR*—then *Bourne*
 4 *Valley*'s contrary construction is not binding. *Swisher*, 771 F.3d at 524; *Bonilla*, 423 F. App'x at
 5 740; *Henderson*, 285 F. App'x at 373; *CRST*, 479 F.3d at 1106 n.6; *Rotec Indus., Inc.*, 348 F.3d at
 6 1122 n.3; *Cal. Teachers Ass'n*, 271 F.3d at 1146; *Pershing Park*, 219 F.3d at 903; *Owen*, 713 F.2d
 7 at 1464. *Bourne Valley* turned on the meaning of 116.31168(1), an issue of *Nevada* law that
 8 *Nevada*'s Supreme Court should resolve. After all, core principles of Federalism dictate that state
 9 law is the province of state courts. *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *High v. Ignacio*,
 10 408 F.3d 585, 590 (9th Cir. 2005). It is these principles of Federalism that NRAP 5 is designed to
 11 promote. *Volvo*, 137 P.3d at 1164 (NRAP 5's purposes are federalism, comity, and judicial
 12 efficiency). Ultimately, the certified question's answer will settle important questions of law.

13 **III. CONCLUSION**

14 For the foregoing reasons, this Court should grant SFR's Motion to Certify a Question of
 15 Law to Nevada's Supreme Court. Certification is appropriate because: (i) the certified question's
 16 answer "may 'be determinative of' part" of this case, (ii) *Bourne Valley*'s interpretation of
 17 116.31168(1) acted as though "there is no controlling" Nevada precedent, and (iii) the answer "will
 18 help settle important questions of law." *Volvo*, 137 P.3d at 1164.

19 DATED this 17th day of November, 2016.

20 **KIM GILBERT EBRON**

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statute contrary to the construction given it by the highest court of a State."); *High v. Ignacio*, 408 F.3d 585, 590 (9th Cir. 2005) ("This court accepts a state court ruling on questions of state law.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November 2016, pursuant to FRCP 5, I served via the CM-ECF electronic filing system the foregoing **MOTION TO CERTIFY A QUESTION OF LAW TO NEVADA'S SUPREME COURT** to the following parties:

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